UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SECURITAS SECURITY SERVICES USA, INCORPORATED	)	
Petitioner/Cross-Respondent	)	**Case No. 16-60304**
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR PARTIAL RECONSIDERATION OF SUMMARY ORDER

To the Honorable, the Judges of the United States Court of Appeals for Fifth Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, respectfully requests that the Court reconsider part of its summary-reversal order issued on August 16, 2016. The Board accepts that the Court's summary reversal of the Board's findings that Petitioner Securitas Security Services USA, Incorporated ("the Company") unlawfully maintained and enforced collective-action waivers in its arbitration agreements is consistent with controlling circuit precedent holding that such waivers are lawful and enforceable. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016-18 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-63 (5th Cir. 2013), *petition for reh'g en banc denied*,

5th Cir. No. 12-60031 (April 16, 2014). But this case involves *additional* unfair labor practices that do not turn on a concerted-action waiver and cannot similarly be decided as a matter of law. The Board accordingly requests that the Court reconsider the portion of its order summarily reversing those additional unfair labor practices.

1. This Court has repeatedly stated that summary disposition is typically reserved for situations "where time is truly of the essence" or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where . . . the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir.1969) (summarily reversing district court decision enjoining NLRB from enforcing settled pre-election procedures; holding that appellate court is not compelled to sacrifice its time "when a case is frivolous or its outcome so certain"); *accord United States v. Sherman*, 623 F. App'x 244, 245 (5th Cir. 2015); *United States v. Bodine*, 534 F. App'x 238, 239 (5th Cir. 2013). Thus, absent an exigency demanding immediate decision, summary disposition is inappropriate where there is a non-frivolous dispute over the facts or inferences to be drawn from the facts. *See Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992); *Sherman*, 623 F. App'x at 245.

2. In the Decision and Order on review, the Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by maintaining language in its arbitration agreements that would reasonably tend to interfere with employees' right to file unfair-labor-practice charges with the Board. The Board's finding of unlawful interference depends on an assessment of whether employees would reasonably construe the agreements as prohibiting the filing of Board charges. *Murphy Oil*, 808 F.3d at 1019; *D.R. Horton*, 737 F.3d at 363. That inquiry, in turn, requires consideration of the specific wording of the agreements from the perspective of non-lawyer employees, with the understanding that any vagueness or ambiguity in the relevant terms or overall agreements must be construed against the Company as the promulgator of the agreements. *See Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) (ambiguities construed against employer), *enforced*, 746 F.3d 205 (5th Cir. 2014); *U-Haul Co. of Cal.*, 347 NLRB 375, 377-78 (2006) (language read from position of layperson), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

3. The specific language of the Company's agreements has not been examined by this Court in any prior case. Accordingly, there is no precedent compelling any particular reading of the agreements here and summary reversal is inappropriate. *See Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992) (summary disposition "inappropriate" where decision requires analysis of disputed employer

motivation); *Webb v. Allstate Life Ins. Co.*, 536 F.2d 336, 340 (10th Cir. 1976) (summary disposition "inappropriate" where inferences favorable to one party "could be deduced from the facts and circumstances").

4. The Company, in its motion for summary reversal, emphasized the Court's holding in *Murphy Oil* that "it would be unreasonable for an employee to construe [] an agreement as prohibiting the filing of Board charges 'when the agreement says the opposite.'" (Motion at p.3, quoting *Murphy Oil*, 808 F.3d at 1020.) The crux of the problem here is that the Company's agreements *do not* plainly "say[] the opposite." *Murphy Oil*, 808 F.3d at 1020. Like the agreement found lawful in *Murphy Oil*, the Company's agreements mandate individual arbitration of employment-related disputes while also purporting to leave intact employees' right to file charges before the Board. *See Murphy Oil*, 808 F.3d at 1019-20; *Securitas Sec. Servs. USA, Inc*, 363 NLRB No.182, 2016 WL 277291, at *1 (2016). However, unlike the agreement upheld in *Murphy Oil*, the Company's agreements go on to qualify that right to bring administrative charges: the right exists "only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." *Securitas*, 2016 WL 277291, at *1. As the Board found, that caveat is "confusing and ambiguous." *Id.* at *4. It presumes an understanding of "applicable law" that non-lawyer employees simply do not have.

5. In sum, the ultimate question before the Court—whether substantial evidence supports the Board's finding that employees would reasonably construe the Company's agreements as barring them from exercising their right to file Board charges—cannot be disposed of as a matter of law under *Murphy Oil*. Rather, it is a case-specific factual question that requires briefing. The Board accordingly submits that the Court should reconsider its summary reversal of the Board's findings of violations based on interference with employees' access to the Board's processes, and withhold any judgment as to those violations until the parties have had an opportunity for briefing.

6. Board counsel has informed counsel for the Company, William Emanuel, of this motion, and he has stated that the Company opposes it.

WHEREFORE, the Board respectfully requests that the Court grant this motion for partial reconsideration and permit briefing of the violations relating to interference with the right to file unfair-labor-practice charges with the Board.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
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Dated at Washington, D.C.
this 25th day of August 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
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NATIONAL LABOR RELATIONS BOARD
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Dated at Washington, D.C.
this 25th day of August 2016